(14)

Office - Supreme Court, U. S.
FILED
AUG 27 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 340

DOEHLER METAL FURNITURE CO., INC.,
Petitioner,

v.

LINDSAY C. WARREN, Comptroller General of the United States,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

NATHAN BOONE WILLIAMS,
1010 Vermont Avenue,
Washington, D. C.
Counsel for Petitioner.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDER, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

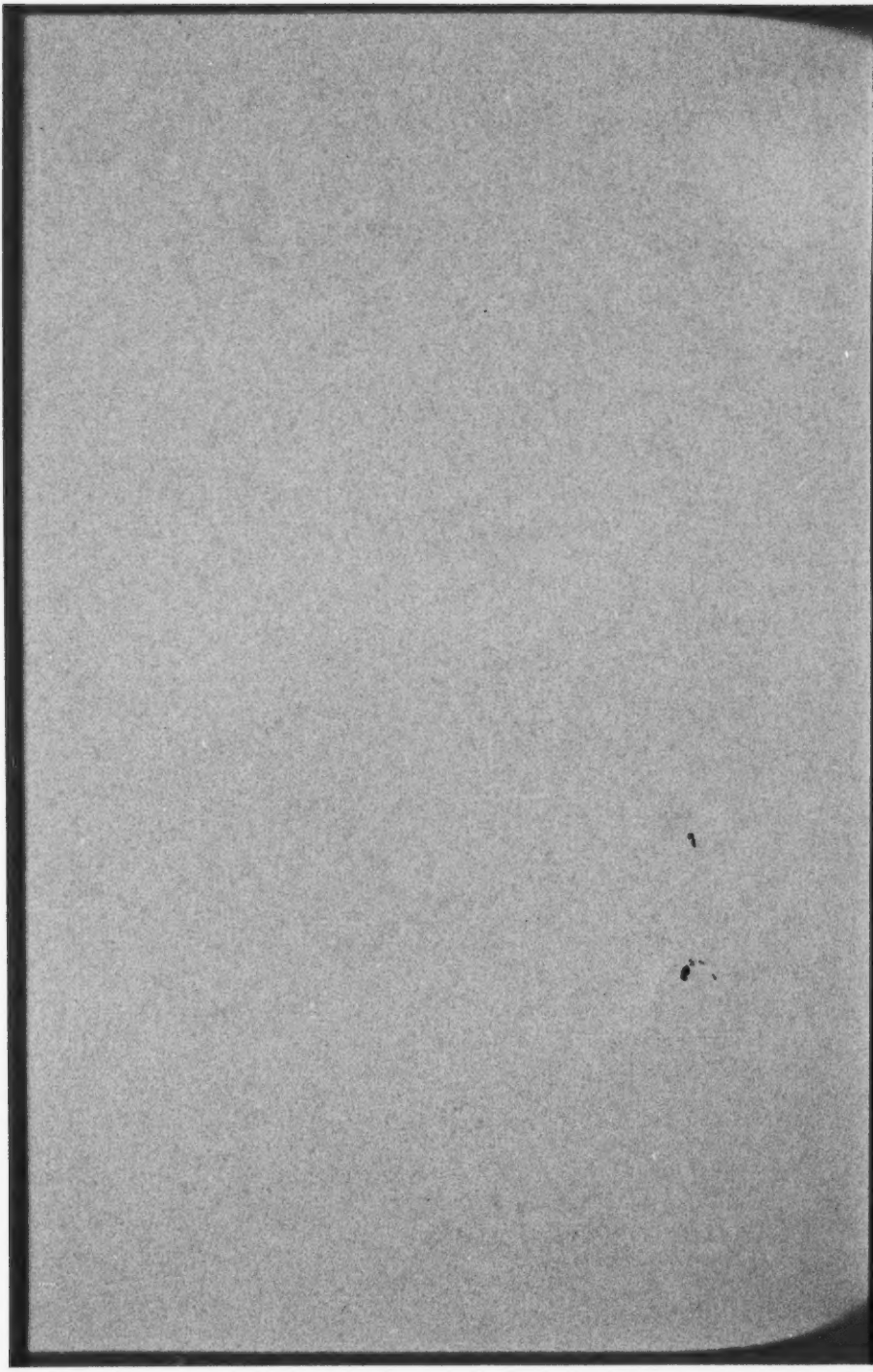

TABLE OF CONTENTS.

	Page
Opinion Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	2
Grounds for Applying for Writ	3
Statement	3
Specifications of Errors to be Urged	4
Reasons for Granting the Writ	4

TABLE OF CASES AND STATUTES.

Cases:

Aetna Life Insurance Co. v. Haworth, 200 U. S. 227, 240 6

Filburn v. Helke and the Secretary of Agriculture, No. 59 6

Miguel v. McCarl, Comptroller General, 291 U. S. 442, 455, 456 5

The Washington Terminal Co. v. F. E. Boswell, *et al.*, No. 28 6

United States v. Golden Gate Bridge and Highway District of California, 37 Fed. Supp. 595 6

Wicker v. Hoppeck, 75 U. S., 6 Wall. 94 7

Statutes:

Declaratory Judgment Act of June 14, 1934, as amended in 1935 by Pub. Law 407, 74th Congress, Section 274D of the Judicial Code, C. 512, 48 Stat. 955 ..... 2, 5, 6, 8

Page

Miscellaneous:

Judicial Code, Section 240 as amended (28 U. S. C., 347, 43 Stat. 938) 2

Rule 57, Rules of Civil Procedure for the District Courts of the United States 5, 8

Rule 81, (b), Rules of Civil Procedure for the District Courts of the United States 5

H. Rept. 1264, 73d Cong. 2d Sess. 5

III Williston on Contracts, 2401 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 340

DOEHLER METAL FURNITURE CO., INC.,
Petitioner,

v.

LINDSAY C. WARREN, Comptroller General of the United States,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

The Doehler Metal Furniture Co., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above entitled cause on June 15, 1942 (R. 4), which approved the judgment of the District Court of the United States for the District of Columbia dismissing the complaint herein.

Opinion Below.

The opinion of the United States Court of Appeals for the District of Columbia (R. 10) was handed down on June 15, 1942, and reported in 75 App. D. C., ..., and 129 Fed. (2d), ..43..

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on June 15, 1942 (R. 14). The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, as amended (28 U. S. C., 347, 43 Stat. 938).

Statute Involved.

This suit is brought under and in accordance with the Declaratory Judgment Act of June 14, 1934, as amended in 1935 by Pub. Law 407, 74th Congress, and is Section 274D of the Judicial Code, c. 512, 48 Stat. 955. As amended, the pertinent provisions thereof are as follows:

> Section 274D. (1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power, upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

Questions Presented.

1. Whether the Comptroller General is suable under the Declaratory Judgment Act?
2. Whether, the facts as alleged by petitioner, appellant below, being admitted by the motion to dismiss, petitioner is entitled to have a declaration of the applicable law as prayed?

Grounds for Applying for Writ.

1. The questions presented are of general importance. Tens of thousands of contracts with the United States, involving many millions of dollars, will develop hundreds of disputes and actual controversies between the contractor and the Comptroller General of the United States. Most of such controversies will arise over questions of the applicable rule of law to an undisputed factual condition.
2. The questions presented are of substance relating to the application of a statute of the United States, which have not been, but should be, settled by this court. The case is a simple one; designedly so. It is a case of first impression.
3. The rights of the petitioner to have from the court a declaration of the applicable law to an undisputed set of facts, which declaration would avoid the expense and delay of a suit for the recovery of a given sum of money are at issue.

Statement.

Subject to the interpolations within parenthesis and printed in italics, we adopt the statement of the case as set forth in the opinion of the United States Court of Appeals for the District of Columbia.

Plaintiff (appellant) had a contract with the Government to furnish the War Department supplies in the gross amount of $92,000 plus. The contract provided that if plaintiff failed to make deliveries by specified times, the Government could terminate plaintiff's right to proceed, make substitute purchases, and hold plaintiff liable for the "excess cost occasioned the Govern-

ment." The Government accepted delivery on a little less than $9,000 worth. The cancellation of the contract by the Government (which action is assumed to have sufficient cause) (*Such presumption does not attend a motion to dismiss, but is rather a matter of defense under appropriate circumstances.)* left supplies to be obtained which would have cost it $82,607.77, under the contract with plaintiff. The Comptroller General in his settlement of claim has determined that it cost the Government $104,290.19 to obtain the remainder of the supplies. Thus the excess cost which plaintiff owes as damages is $21,682.42. The plaintiff alleges that the actual cost to the Government was $94,881.57, and therefore, the excess cost should be $12,273.80, which is $9,408.62 better from its viewpoint. (*Such actual cost as alleged must be and is admitted to be true by the motion of Comptroller General to dismiss the complaint.*)

Specifications of Errors to be Urged.

The United States Court of Appeals for the District of Columbia erred:

1. In holding that there is no actual controversy between the parties, whether of law or fact.
2. In holding that "The judiciary has confined its control over the Comptroller General, so far as we know, to writs of mandamus and mandatory injunctions."
3. In holding that "the only jurisdiction the District Court has ever had over the actions of the Comptroller General is that of mandamus."
4. In affirming the judgment of the District Court below.

Reasons for Granting the Writ.

While the Comptroller General is a government official, clothed with the habiliments of great power, his acts in con-

travention of law, or in violation of correct legal principles applicable to the subjects with which he deals, are subject to review by courts of law. *(Miguel v. McCarl, Comptroller General,* 291 U. S. 442, 455, 456.)

Nor, is a suit against the Comptroller General a suit against the United States. *(Miguel v. McCarl, Comptroller General,* 291 U. S. 442, 455, 456.)

The Declaratory Judgment Act and the new Rules of Civil Procedure supply an appropriate, useful, and effective opportunity for the determination of the "rights and other legal relations" of citizens "in cases of actual controversy" in the dealings of the citizen with the Comptroller General of the United States. *(Rule 57, Rules of Civil Procedure for the District Courts of the United States.)* (H. Rept. 1264, 73d Cong. 2d Sess.)

The procedure of mandamus is abolished. *(Rule 81, (b), Rules of Civil Procedure for the District Courts of the United States.)*

As a modern substitute for the cumbersome procedure of mandamus against officials, and, as a substitute for frequently long delayed and expensive direct action by suit against the government of the United States, Congress passed the Declaratory Judgment Act, which, in appropriate cases may be used to determine the legal relations of the parties dealing with such subjects. This Court has appropriately implemented such law by Rule 57 of the Rules of Civil Procedure.

It matters not that another adequate remedy exists.

This Court has broadly interpreted the scope, function, and application of the Declaratory Judgment Act. *(Aetna Life Insurance Co. v. Haworth,* 200 U. S. 227, 240.)

This Court has recently noted probable jurisdiction and accepted for review two cases, both of which were brought under the Declaratory Judgment Act, and, one of which includes as defendant an official of the government of the United States. *(Filburn v. Helke and the Secretary of Agriculture, No. 59...,* and *The Washington Terminal Co. v. F. E. Boswell, et al., No. 28....)*

Any doubt that the Declaratory Judgment Act may be used under appropriate circumstances to question the acts of officials of the United States is adequately disssolved by remembering that after the passage of the law and despite comprehensive provisions of statutes relating to the determination, assessment, and collection of Federal taxes, it came to the attention of Congress that this law was being used to question the validity of revenue legislation. Whereupon, the law was amended in 1935, *(Pub. Law 407, 74th Cong.)* by the insertion of the words: "except with respect to Federal taxes."

This law has recently been successfully invoked by the United States to determine its own rights and legal relations. *(United States v. Golden Gate Bridge and Highway District of California,* 37 Fed. Supp. 595.)

To say that government officials may use this procedure to challenge the acts of the citizen, leaving to him only the right to defend, and, at the same time to hold that its provisions may not be called into action by the citizen to challenge the acts of governmental officials is to defeat the objective of the law itself.

The Comptroller General is not beyond the jurisdiction and direction of the courts of justice in the discharge of his important duties, when, as in this case, his acts are appropriately brought to the attention of the judiciary.

A case of "actual controversy" is here presented as between petitioner and the respondent, Comptroller General. Such arises not alone over the sum to be properly charged against respondent, but under the admitted facts as disclosed by this record an "actual controversy" exists as to the correct rule of law to be applied to the admitted facts. To declare the law is the peculiar function of the judiciary.

Where a party is entitled to the benefit of a contract, and can save himself from loss arising from a breach thereof, it is his duty to do so. *(Wicker v. Hoppeck,* 75 U. S., 6 Wall. 94.)

The damages must be based upon the *actual loss,* being the difference between the actual expenditures laid out and the sum called for in the contract. *(III Williston On Contracts,* 2401.) Such difference as shown by the pleadings and the admitted facts in this case is $12,273.80 instead of $21,682.42, as charged and claimed by the Comptroller General.

The pleadings show (Exhibit A, R. 5.) that the Comptroller partially recognizes the sound principle as to the duty of the injured party to *reduce his cost, or damage.*

Stating the account under correct rule of law is the function of the Comptroller General. To advise him what the correct rule of law is under the admitted facts is the province of the judiciary. Such relief was asked by petitioner

under the provisions of the Federal Declaratory Judgment Act.

To deny the declaration of the correct rule of law as to what are "excess costs" under the admitted facts is to unwarrantably restrict the usefulness of declaratory procedure. Petitioner is entitled to have such declaration. When had all issues will be readily dissolved as between it and the Comptroller General. The objects of the declaratory law will have been attained. The rightful interests of all concerned will have been promptly discovered and adequately preserved under the protective processes of the laws of the land by its courts of justice.

Under the decision below the petitioner is deprived of the opportunity for a judicial declaration of its rights under the Declaratory Judgment Act and Rule 57 of the Rules of Civil Procedure adopted by this Court.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia should be granted.

August 17, 1942.

NATHAN BOONE WILLIAMS,
1010 Vermont Avenue,
Washington, D. C.,
Counsel for Petitioner.